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In the Supreme Court of the United States

OCTOBER TERM, 1933.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. 34.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. 35.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. 36.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. 37.

REPLY BRIEF FOR PETITIONER.

FRANK O. RICHEY,
WILLIAM H. BOYD,
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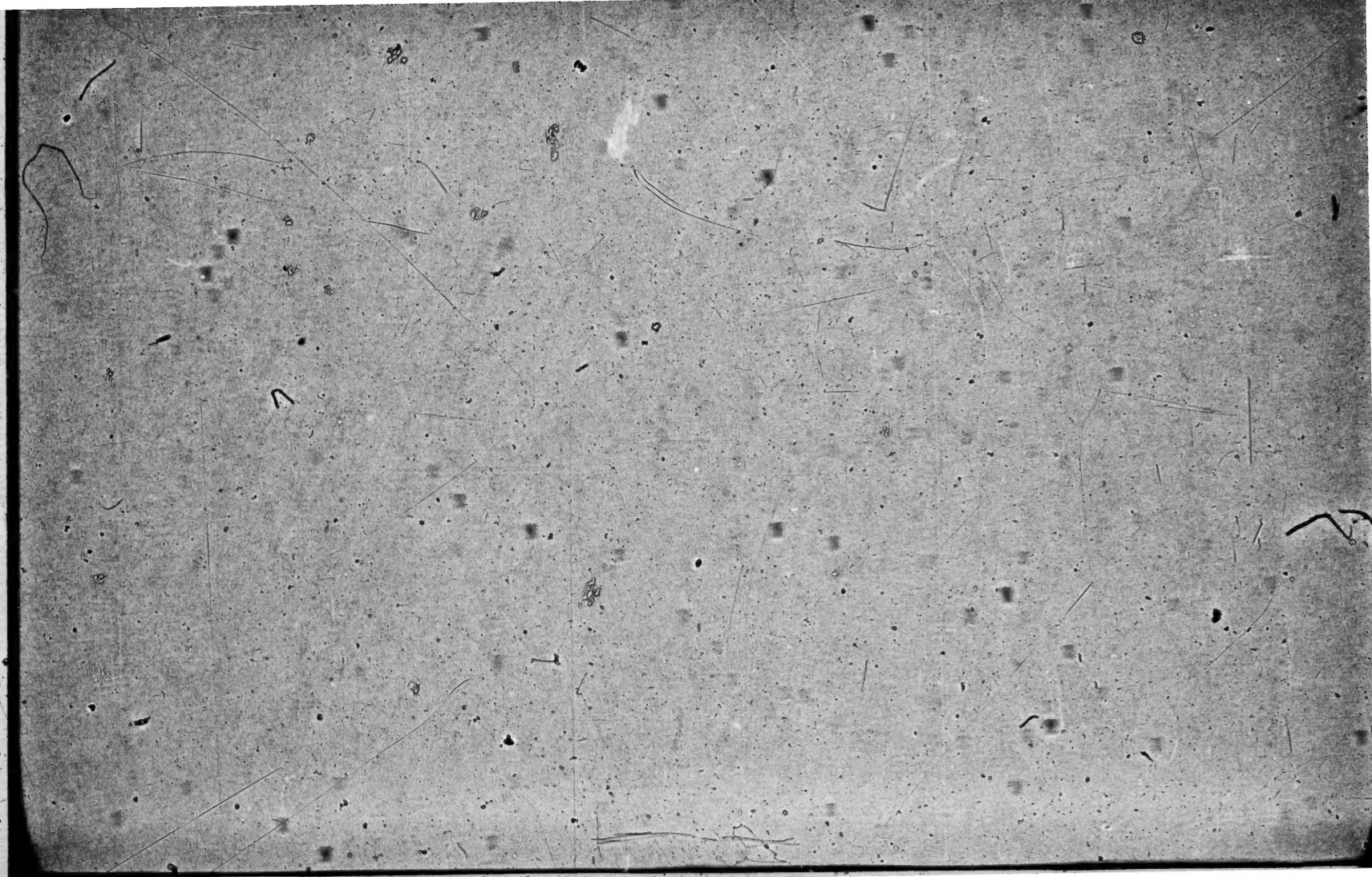

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The brief of the respondents was served on us on the morning of October 16, 1933. At the same time we were notified by the Clerk of this Court that the cause would probably be heard by this Court on October 18, 1933, making it necessary for us to leave Cleveland for Wash-

ington on the night of the 16th to be certain that we would be present at the hearing on the 18th, or even possibly on the 17th. Of necessity this Reply Brief has been hastily prepared. We have not had time to answer all of the contentions or to correct all of the errors in the Respondents' Brief in the few hours available to us to reply to the belated brief of Respondents.

We ask the Court for leave to file this Reply Brief and that the Court consider it.

(I) Downie patent No. 1,511,114 (the alleged tainted one) contains fourteen claims, each claim of which, under the authority of this Court, is for a separate invention. (*Leeds & Catlin vs. Victor*, 213 U. S. 301.) The claims are divided into three groups, relating to separate and distinct combinations; claims 1 to 5, so distinct from the others that they are not involved in this suit, being the first group, claims 7 and 8 the second group, and claims 6 and 9 to 14 being the third group. If we were admitting that there was "unclean hands" concerning the group of claims (6, 9, 10, 12 and 13) charged to be anticipated by the Joplin work in the instant cases, (Vol. II, pp. 636 and 638) and then asking the Court to hold that there was no "unclean hands" with respect to the claims (1 to 5, 7 and 8 and 11 and 14) not claimed to be anticipated by the Joplin work, we would come in principle within the authorities relied upon by the Respondents, such as the Bottomry Bond Case (*Carrington vs. Pratt*) where it was found that there was fraud with respect to parts of a single document or cause. We are not, however, making such contention. The several patents in suit are separate grants, separate documents and separate causes of action, and the cause of action on each is different from the cause of action on the others. That is the distinction that was made by the Second Circuit Court of Appeals in the case of *Maatschappij vs. Kosloff* and by the Ninth Circuit Courts in the

Meyerfield case and by the other Courts in the cases which we have relied upon.

(II) It is contended that we are incorrect in saying that the Court of Appeals said that we came into the Court with "unclean hands" with respect to one patent only. The Court of Appeals ordered the reopening and the rehearing in the *Byers Case* before the District Court on "unclean hands" with respect to the one patent only. (Vol. V, p. 109.) The District Court in the instant cases found that the reprehensible conduct related to one patent only. In its opinion the Court of Appeals not only said that the necessary connection between the suits would have been lacking if the plaintiff had based its action only upon the other patents in suit than the one to which the fraud was alleged to be attached, but also ordered that if the present suits were dismissed new suits might be prosecuted in equity upon the other patents in suit except patent No. 1,511,114 and that plaintiff might even commence anew an action in equity upon all of the patents including the sullied patent. (Vol. V, pp. 123 and 124.)

The parties so treated the matter in the Court of Appeals and the Court of Appeals so understood it, as is clear from the following statement in the Court's opinion on the Petition for Rehearing (Vol. V, p. 157):

> "Two principal contentions are advanced in support of the petition for rehearing. The first is that the original action is founded upon alleged infringement of five patents and that the bill should not be dismissed as to the *four patents to which the 'unclean hands' had no application.*"

Respondents erroneously contend:

(1) That Judge Hahn clearly indicated that he found the Clutter and first Downie patents invalid. He found each of these patents valid and infringed and so held in the decrees which were entered. (Vol. II, pp. 1107 and

1137.) A Court speaks through its decrees. (*Bissell v. Goshen*, 72 Fed. 545, 554 (C. C. A. 6); *Wooster v. Handy*, 23 Fed. 49, 56 (C. C. N. Y.); 21 *Corpus Juris* 641, Secs. 820, etc.; *Cyclopedia of Federal Procedure*, Vol. 4, Sec. 1010.)

(2) That the evidence taken before Judge Jones in the *Byers Case* is not properly before this Court.

(a) It was duly presented in the record and no motion for diminution has been made, as must have been under Rule 17 of this Court.

(b) The sole claim of fraud in the instant cases is based upon alleged presence of fraud in the *Byers Case*. Respondents complain because we go to the record in the *Byers Case* and the opinion of the trial Court in that case to show that there was no fraud in that case and that the trial Court there so held. Even so, respondents do not dispute the propriety of this Court referring to the decree in the *Byers Case*, holding that there was no suppression of evidence materially affecting the defendant's rights and that the Downie patent No. 1,511,114 was valid and infringed in the face thereof, which decree is at Vol. V, pp. 109 and 110. The opinion of Judge Jones on this question now appears at 4 Fed. Sup. 160. Respondents' sole claim for fraud in the instant cases is based upon the claim that the decree in the *Byers Case* was procured through fraud and complains that we go to the record and the decision in the *Byers Case* to show that there was no fraud there and the Court so held and so decreed and to rebut the claim and evidence in the instant case said to establish fraud there.

(c) Respondents complain because we do not include in Volume V all of the record in the *Byers Case*. The relevant testimony whose absence is complained of is in the instant cases. (Vol. III, pp. 988-1041, and 1061-1062 and the testimony stipulated from the instant cases recited in the decree, Vol. V, p. 109.) Respondents were at full liberty to file any and all of the record in the *Byers Case* that they wished to file, but filed none.

(d) All the evidence in the record here was before the Court of Appeals when it handed down its opinion which is before this Court for review.

Of what avail would any evidence in the instant cases to the effect that there was fraud in the *Byers Case* be against the record in the *Byers Case* which showed there was no fraud? Any evidence in the instant cases that there was fraud in the *Byers Case* would be secondary. The record in the *Byers Case* would be the primary record evidence as to whether or not there was fraud in that case. The conclusion of any witness or the trial Judge in the instant cases that there was fraud in the *Byers Case* would be secondary. The best opinion evidence on that question would be the conclusion of the trial Court in the *Byers Case*. The best evidence as to whether or not the decrees in the *Byers Case* were procured by fraud is the decree of the trial Court there in which he held that the decree in that case was not procured through fraud. (Vol. V, pp. 109 and 110.)

(3) That the patents in suit are treated as "a single development in the art." Each of the patents in suit is a separate grant. They were issued on dates widely separated from each other and represent separate and several steps in the art.

(4) That Mr. Downie testified as to the number of machines sold without distinguishing the machines of one patent from another. The record shows (Vol. I, p. 231) that he testified that about six hundred machines of the Clutter patent had been sold, and at page 252 of the same volume, he testified as to the number of machines made under the first Downie patent.

(5) That defendant demonstrated but one machine. Defendant demonstrated in the Court a Clutter patented machine, Plaintiff's Exhibit P-15 (Vol. I, p. 235) and a second machine, Plaintiff's Exhibit P-17 (Vol. I, p. 245) built

after the first Downie patent. These models were replicas on a reduced scale of the machines of these patents.

(6) That the affidavit says the Joplin machine was abandoned and there is an inconsistency when Mr. Downie says that he paid for Clutter's rights therein. The agreement, however, was not for Clutter's improvements in the excavating machine, but for improvements in a "ditcher scoop" which was a sub-combination of the excavating machines. The agreement itself distinguishes between the "ditcher scoop," which is the sub-combination, and the "excavating machine," which was the machine as a whole. (Vol. IV, p. 1298.) The record shows that though the machine as a whole was abandoned, the scoop itself as a sub-combination was continued to be used. (Vol. II, p. 616; Vol. V, p. 86.)

(7) That Clutter was the key man and that is the reason why effort was made to suppress his testimony while no effort was made to suppress the testimony of the thousands of other people who saw the experiment at Joplin. Clutter, however, was not the key man, as he himself admitted. (Vol. V, p. 42.) He was merely the operator of the machine. Others designed and made the Joplin apparatus and made the efforts to correct its faults without success. (Vol. V, pp. 84 to 89; Vol. I, p. 600; Vol. II, p. 610.)

(8) It is contended that the Joplin machine was a success. This is a conclusion of counsel contrary to the affidavits of Clutter and Wallower and to the finding of Judge Jones and the decrees of Judges Jones and Hahn.

(9) The sketches shown at the bottom of page 55 and on page 59 of Respondents' brief of the alleged Joplin machine are what is known as present day recollection sketches, that is, sketches made by Clutter based on his recollection in 1929 of what happened in 1919 and when he was in the pay of the defendants and hostile to the plaintiff. It is such testimony as this that this Court re-

fused to accept in the *Barbed Wire Case*, the *Paper Machine Case* and the other Courts have refused to accept in numerous cases. The conclusion of Judge Jones on this subject is stated at 4 Fed. Sup. 161 as follows:

> "I find that the Joplin machine was not satisfactory; that it was never perfected to the point of successfully accomplishing the result claimed for it; that it was an abandoned experiment."

It is contended that Downie admitted that the Joplin work was a public use by the taking of the affidavit. On the contrary, the affidavit says that it was experimentation which was abandoned.

(10) On the question of the production of the documents respondent would be fairer if it stated the facts that petitioner opposed the production of these documents on the ground that they were immaterial until it was learned that Judge Hahn expressed the view that he thought they were material and then plaintiff volunteered to produce them whereupon the Court denied the motion of the respondents and the records were produced without further proceedings: (Vol. I, pp. 82 and 83.)

There was no agreement to produce any of these documents prior to that time. Plaintiff up to the hearing before Judge Hahn opposed their production on the ground that they were immaterial which, of course, has been shown to be true as a result of the reopening proceedings in the *Byers Case*.

(11) Many of the charges which respondents make against petitioner are based upon the conclusion by respondents that there was a public use at Joplin, that such anticipated any of the claims or subject matter of the Downie patent, both of which conclusions have been found to be erroneous by all of the Courts who ruled on them.

(12) Respondents complain because we said in our Brief that they paid Clatter for testifying. They, how-

ever, do not deny that they did, and the record shows that Clutter admitted that they did. (Vol. V, pp. 57 and 58.)

(13) That we are in error in saying that respondents charged that only certain of the claims of Downie patent No. 1,511,114 are anticipated by the Joplin work. Respondents at least twice in the record stated that they claimed that only Claims 6, 9, 10, 12 and 13 were anticipated by such work. (Vol. II, pp. 636 and 638.) Moreover, at page 638 of the record respondents went so far as to withdraw Claim 14 from the charge that it was anticipated by the Joplin work.

Claims 1 to 5 of the Downie patent 1,511,114 are not even in suit in the instant cases so that there is not and could not be any charge that they are anticipated.

Conclusion: It does not seem to us necessary for anybody to "imply" or to argue what seems "obvious" to them or to otherwise speculate as to why the compensation was given by the plaintiff to Clutter. Mr. Downie testified that it was given to hold him to the truth about what happened at Joplin. There is nothing inconsistent with any theory of honesty or dishonesty for a man who is investing much more than Four Thousand Dollars in a patent suit and which is of much greater importance than Four Thousand Dollars to him to pay a man whom he knew to be shifty and dishonest even as much as Four Thousand Dollars to hold him to the truth and to prevent his fabricating and glorifying evidence regarding the Joplin work which this Court has said in so many cases happens so frequently in patent cases regarding these old abandoned experiments.

Respectfully submitted,

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